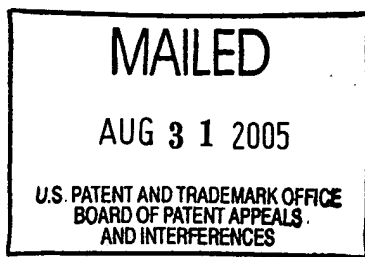


The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**



Ex parte WILLIAM PATRICK APPS

Appeal No. 2005-1294
Application No. 09/785,100

ON BRIEF

Before KIMLIN, PAK, and TIMM, Administrative Patent Judges.

PAK, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal under 35 U.S.C. § 134 from the examiner's final rejection of claims 1 through 51, which are all of the claims pending in the present application.

APPEALED SUBJECT MATTER

The subject matter on appeal relates to low depth nestable display crates for transporting and storing bottle carriers. See the specification, page 1. These crates are said to be “nestable with other similar crates when empty to conserve space, and which is stackable and cross-stackable with other similar crates when loaded with bottles for storing, displaying and transporting the multi-packs.” See the specification, pages 2 and 3. According to page 3 of the specification:

The preferred configuration [of the crates] is for four six-pack carriers of bottles. It will be understood that while the preferred embodiment of the present invention is configured for retaining six-pack bottle carriers, the crate may be used to store or transport any type of container and differently grouped multi-packs.

Although the specification does not define the meaning and scope of “bottle carriers,” it states that “bottles are grouped together in a cardboard carrier or otherwise bundled...” and that a shrink wrap can be used as a carrier. See the specification, page 2. Thus, we determine that the term “bottle carriers” encompasses a conventional thin plastic web material having circular-shape holes (ring carrier) for bundling and transporting multiple bottles and/or any other bottle carriers, including those which conform to the shapes of the interior surfaces of the prior art crates relied upon by the examiner. In re Zletz, 893 F.2d 319, 321-22, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989)(“During patent examination the pending claims must be interpreted as broadly as their terms reasonably allow.”).

Details of the appealed subject matter are recited in representative claims 1, 2, 15, 16, 28 and 33¹ which are reproduced below.

1. A low depth nestable display crate for bottle carriers comprising:
 - a floor for supporting the bottle carriers; and
 - a wall structure having endwalls and sidewalls extending around the periphery of said floor and comprising
 - a lower wall portion including an exterior surface along said sidewalls, the lower wall portion further including interior bottle carrier support surfaces connected to said floor,
 - a double thickness upper wall portion comprising spaced tooth members extending upward from said lower wall portion and defining display openings between said tooth members along said sidewalls, wherein said display openings are sized to reveal labels on the bottle carries [sic. carriers] for displaying the bottle carriers in a loaded crate, and
 - a handle bar integrally molded with said tooth members along said endwalls and said lower wall portion defining a cut-out, said cut-out providing said handle bar complete clearance below said handle bar, and complete clearance above said handle bar from a stacked crate thereabove, and provide sufficient clearance between said handle bar and the bottle carriers loaded in said crate to enable a user's hand to encircle said handle bar.
2. The crate of claim 1, comprising interior teeth panels provided on the interior side of said tooth members, said teeth panels being flat to provide lateral support to the bottle carriers loaded in said crate.

¹ The appellant has grouped the claims on appeal (the Brief dated October 23, 2003, page 6) as follows:

Group I - Claims 1, 3-14, 20, 27, 31 and 40-49;
Group II - Claim 2;
Group III - Claims 15, 17-19, 21-26, 50 and 51;
Group IV - Claim 16;
Group V - Claims 28-30, 32 and 34-39; and
Group VI - Claim 33.

Therefore, for purposes of this appeal, we select claims 1, 2, 15, 16, 28 and 33 as representative of the claims on appeal and determine the examiner's rejections set forth in the Answer based on these claims alone consistent with 37 CFR § 1.192(c)(7)(2003).

15. A low depth nestable display crate for bottle carriers comprising:

a floor having an upper surface for supporting the bottle carriers, and a lower surface; and

a pair of opposed endwalls and a pair of opposed sidewalls extending around the periphery of said floor,

the sidewalls comprising a sidewall lower wall portion having an exterior surface and further having interior bottle carrier support surfaces connected to said floor, the sidewall further comprising a double thickness upper wall portion including spaced-apart sidewall tooth members extending upwardly from said sidewall lower wall portion and defining display openings between said sidewall tooth members, wherein said display openings are sized to reveal labels on the bottle carriers for displaying the bottle carriers in a loaded crate,

the endwalls comprising a handle bar integrally molded with endwall tooth members and an endwall lower wall portion including a cut-out, said cut-out providing said handle bar clearance below said handle bar, and a clearance above said handle bar from a stacked crate thereabove, and provide sufficient clearance between said handle bar and the bottle carriers loaded in said crate to enable a user's hand to completely encircle said handle bar.

16. The crate of claim 15, wherein said tooth members include interior teeth panels provided on the interior side thereof, said teeth panels being flat to provide lateral support to the bottle carriers loaded in said crate.

28. A low depth nestable display crate for bottle carriers comprising:

a floor having an upper surface for supporting the bottle carriers, and a lower surface; and

a wall structure having endwalls and sidewalls extending around the periphery of said floor and comprising

a lower wall portion including an exterior surface along said sidewalls and interior portions connected to said floor upper surface, wherein the exterior surface and the interior portions are connected by at least one member extending therebetween,

a double thickness upper wall portion comprising spaced tooth members extending upwardly from said lower wall portion and defining display openings between said tooth members along sidewalls, wherein said display openings are sized to reveal labels on the bottle carriers for displaying the bottle carriers in a loaded crate, and

a handle bar integrally molded with said tooth members along said endwalls and said lower wall portion defining a cut-out, said cut-out providing said handle bar with complete clearance below said handle bar, and complete clearance above said handle bar from a stacked crate thereabove, and providing sufficient clearance between said handle bar and the bottle carriers loaded in said crate to enable a user's hand to encircle said handle bar.

33. The crate of claim 28, comprising interior teeth panels provided on the interior side of said tooth members, said teeth panels being flat to provide lateral support to the bottle carriers loaded in said crate.

REFERENCES

The prior art references relied upon by the examiner are:

Koefeldt	5,465,843	Nov. 14, 1995
Apps et al. (Apps '461)	5,651,461	Jul. 29, 1997
		(Filed Apr. 13, 1995)
Apps et al. (Apps '482)	5,704,482	Jan. 6, 1998
		(Filed Apr. 18, 1995)

The references (no longer relied upon by the examiner) referred to by the Board are:

Apps (Apps '654)	5,979,654	Nov. 9, 1999
		(Filed Aug. 29, 1997)
Apps (Apps '012)	Des. 400,012	Oct. 27, 1998
		(Filed May 15, 1997)

REJECTIONS

The appealed claims stand rejected (the Supplemental Answer, page 3) as follows²:

- (1) Claims 1 through 51 under 35 U.S.C. § 102(e), as anticipated by the disclosure of Apps '461;
- (2) Claim 15 through 19, 21 through 26, 50 and 51 under 35 U.S.C. § 102(e), as anticipated by the disclosure of Apps '482; and
- (3) Claims 28 through 30 and 32 through 38 under 35 U.S.C. § 102(b) or (e) as anticipated by the disclosure of Koefeldt.

OPINION

We have carefully reviewed the claims, specification and applied prior art, including all of the arguments advanced by the examiner and the appellant in support of their respective positions. This review has led us to conclude the examiner's Section 102 rejections are well founded. Accordingly, we affirm the examiner's Section 102 rejections for essentially the findings of fact set forth in the Supplemental Answer. We add the following for emphasis and completeness.

² Without properly comparing the claims involved, the examiner has withdrawn the obviousness-type double patenting rejections based on Apps '654 and Apps '012. In the event of further prosecution, the examiner should reintroduce the obviousness-type double patenting rejection of **at least** claims 1 and 2 of the present application based on claims 1 and 2 of Apps '654. Claims 1 and 2 of Apps '654 anticipate the subject matter recited in at least claims 1 and 2 of the present application since claims 1 and 2 of the present application do not preclude, for example, the double thickness wall structure recited in Apps '654. Moreover, unlike *Carman Indus., Inc. v. Wahl*, 724 F.2d 932, 939-40, 220 USPQ 481, 487 (Fed. Cir. 1983), claims 1 through 51 of the present application are directed to the design of a crate, which is identical to those shown and claimed in Apps '012. It appears that claims 1 through 51 as a whole would have taught or suggested the design illustrated and claimed in Apps '012 and the claim of Apps '012 anticipates the subject matter recited in claims 1 through 51 of the present application.

ANTICIPATION

Under Section 102(b), "anticipation" is established only when a single prior art reference discloses, either expressly or under the principles of inherency, each and every element of a claimed invention. **See *In re Spada***, 911 F.2d 705, 708, 15 USPQ2d 1655, 1657 (Fed. Cir. 1990); ***RCA Corp. v. Applied Digital Data Systems, Inc.***, 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir. 1984). The law of anticipation, however, does not require that the prior art reference teach the purpose contemplated by the appellant in the specification. **See *Kalman v. Kimberly-Clark Corp.***, 713 F.2d 760, 772, 218 USPQ 781, 789 (Fed. Cir. 1983). Rather, it only requires that the claims on appeal "read on" something disclosed in the prior art reference. ***Kimberly-Clark Corp.***, 713 F.2d at 772, 218 USPQ at 789.

With these precedents in mind, we turn to the examiner's Section 102(b) rejections. The appellant does not dispute the examiner's finding that the prior art references teach low depth nestable crates corresponding to the crates included in claims 1, 15, 28 and 40, except for features defined by the claimed functional limitations relating to bottle carriers. Indeed, the appellant asserts (e.g., the Reply Brief to the Supplemental Answer, page 7) that:

[The prior art references] are not directed to use with bottle carriers, but rather are designed to interact with single bottles. (See, e.g., Apps '461 - Col. 6, ll. 1-27, Figs. 1 and 14; Apps '482 - Col. 4, ll. 53-60, Figs. 1 and 11; Koefeldt '843 - Col. 5, ll. 11-30, Figs. 3, 14 and 16....

Thus, the dispositive question is whether the claimed functional limitations relating to bottle carriers would have rendered the claimed low depth nestable display crate structurally different from those described in the prior art references. On this record, we answer this question in the negative.

As our reviewing court stated in In re Schreiber, 128 F.3d 1473, 1478, 44 USPQ2d 1429, 1432 (Fed. Cir. 1997):

A patent applicant is free to recite features of an apparatus either structurally or functionally. See In re Swinehart, 439 F.2d 210, 212, 169 USPQ 226, 228 (CCPA 1971) (“[T]here is nothing intrinsically wrong with [defining something by what it does rather than what it is] in drafting patent claims.”). Yet, choosing to define an element functionally, i.e., by what it does, carries with it a risk. As our predecessor court stated in Swinehart, 439 F.2d at 213, 169 USPQ at 228:

where the patent Office has reason to believe that a functional limitation asserted to be critical for establishing novelty in the claimed subject matter may, in fact, be an inherent characteristic of the prior art, it possesses the authority to require the applicant to prove that the subject matter shown to be in the prior art does not possess the characteristic relied on.

As indicated supra, we interpret the term “bottle carriers” recited in claims 1, 2, 15, 16, 28 and 33 as encompassing a conventional thin plastic web material having circular-shape holes for bundling and transporting multiple bottles and/or any other bottle carriers, including those which conform to the shapes of the interior surfaces of the prior art crates relied upon by the examiner. We find nothing in the specification or the claims which limits the structure or shape of the claimed “bottle carriers”.

Having interpreted the term “bottle carriers” in the above manner, we determine that the examiner has a reasonable basis to believe that the claimed functional limitations are inherent characteristics of the prior art low depth nestable crates. Specifically, substantial evidence supports the examiner’s finding that the prior art crates are capable of being used with the “bottle carriers” of the type included by the claims on appeal and that the prior art crate floors are capable of supporting the “bottle carriers” of the type included by the claims on appeal. In re Yanush, 477 F.2d 958, 959, 177 USPQ 705, 706 (CCPA 1973); In re Casey, 370 F.2d 576, 580, 152 USPQ 235, 238 (CCPA 1967); In re Otto, 312 F.2d 937, 939, 136 USPQ 458, 459 (CCPA 1963).

In reaching this determination, we note that the appellant argues that the interior structure of the prior art low depth nestable crates are incapable of accommodating the shapes of the claimed bottle carriers. However, the claims do not recite any limitation relating to the shapes of the bottle carriers. In re Self, 671 F.2d 1344, 1348, 213 USPQ 1, 5 (CCPA 1982)(appellants’ arguments fail from the outset because they are not based on limitations appearing in the claims).

With respect to claims 2, 16 and 33, we concur with the examiner’s finding that at least portions of the interior side of the prior art structures (pylons) corresponding to the claimed tooth members are flat. See also the appellant’s concurrence at pages 10 and 12 of the Reply Brief to the Supplemental Answer in their entirety. However, the appellant appears to argue that the interior structures, including the flat surfaces, of the prior art

tooth members (pylons) are incapable of providing "lateral support to the bottle carrier loaded in said crate." Id. This argument is not based on limitations in the claims since it assumes that the claimed bottle carriers have shapes which are incapable of being laterally supported by the prior art tooth member interior flat surface. Self, 671 F.2d at 1348, 213 USPQ at 5.

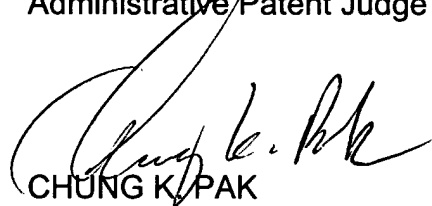
CONCLUSION

In view of the reasons set forth in the Supplemental Answer and above, we affirm the examiner's decision rejecting the claims on appeal under Sections 102(b) and 102(e).

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED


EDWARD C. KIMLIN
Administrative Patent Judge


CHUNG K. PAK
Administrative Patent Judge


CATHERINE TIMM
Administrative Patent Judge

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